Low Kit Mining Company, a successor to Spangler Coal Company, Inc. *and* United Mine Workers of America, AFL–CIO. Cases 9–CA–28402, 9–CA–29108–1, –3, –4, –6, –8, and 9–RC–15876

November 16, 1992

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The principal issues remaining in this case[1] are whether the judge correctly found that: a settlement agreement in Case 9–CA–28402 should be set aside; the Respondent violated Section 8(a)(3) of the Act by refusing to recall four employees who had been lawfully laid off by its predecessor; and the Respondent's predecessor engaged in objectionable conduct which warrants setting aside the results of a representation election held on May 17, 1991. The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

[1] On June 30, 1992, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] We correct the following errors in the judge's decision:

1. The judge stated that after discriminatee Nichols was laid off he ''had no further contact with the Respondent until the new employees were hired in late September and early October.'' Nichols testified that he did not talk to any of the Respondent's officials until the unfair labor practice picketing on October 28, 1991.

2. The judge stated that the Respondent hired Roger Laws as a laborer on October 2, 1991. Although the Respondent hired Michael Laws, Roger's brother as a laborer on October 2, it hired Roger Laws as an electrician on October 25. None of the four discriminatees whom the Respondent failed to recall were certified electricians. Consequently, they were not qualified to fill the position for which Roger Laws was hired.

The judge failed, however, to refer in his decision to the undisputed hiring of Ronnie Johnson as a roof bolter on October 7. The discriminatees were qualified to perform this work. Consequently, the judge's error as to Roger Laws has no impact on his ultimate findings of fact and conclusions of law.

Contrary to argument in the Respondent's exceptions, we find that the judge did not err in finding that the Respondent hired Jerry Holstein as a beltman. This finding is consistent with Holstein's description of his primary function. It is true that Holstein, unlike any of the discriminatees, was state-certified as a ''fire boss.'' He could therefore perform a daily mine safety inspection for 45 minutes to an hour each day. The Respondent has failed to prove, however, that ''fire boss'' certification was a prerequisite for anyone filing the beltman position.

[3] The judge's recommended remedy included reinstatement and backpay provisions for employees whom the Respondent's predecessor unlawfully discharged in March 1991. It is undisputed, however, that these employees were reinstated and that the Respondent has satisfied their backpay claims. At the hearing, the General Counsel expressly disclaimed the intention to pursue any further affirmative make-whole remedy for the discharges. Accordingly, we shall delete such remedial provisions from the recommended Order and notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Low Kit Mining Company, a successor to Spangler Coal Company, Inc., Pond Gap, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer to Rodney D. Lanham, Alan H. Nichols, Kenneth Derrick, and Thomas Osborn Jr. full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or benefits suffered by them as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.''

2. Substitute the following for paragraph 2(c).

''(c) Remove from its files any reference to the unlawful discharges of Louis W. Fauber, Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, Rodney D. Lanham, and Alan H. Nichols in March 1991, and to the unlawful refusal to recall Rodney Lanham, Nichols, Kenneth Derrick, and Thomas Osborne Jr., and notify the employees in writing that this has been done and that the discharges and refusals to recall will not be used against them in any way.''

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 9–RC–15876 shall be severed from this proceeding and remanded to the Regional Director for Region 9.

[Direction of Second Election ommitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees concerning their union activities and sentiments and the union activities and sentiments of other employees.

WE WILL NOT promise employees increases in wages and benefits in order to get them to abandon their support of the Union.

WE WILL NOT solicit grievances from employees during an organizing campaign with a view toward resolving them.

WE WILL NOT threaten to discharge employees or to close the mine if employees select the Union as their bargaining representative.

WE WILL NOT engage in surveillance of union activities of employees or threaten to place their union activities under surveillance.

WE WILL NOT discourage membership in or activities on behalf of the United Mine Workers of America, AFL–CIO, or any other labor organization, by discharging employees, refusing to recall or rehire them, or otherwise discriminating against them in their hire or tenure.

WE WILL NOT by any other means or in any manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WE WILL offer Rodney D. Lanham, Alan H. Nichols, Kenneth Derrick, and Thomas Osborne Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from our refusal to recall them, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the unlawful discharges of Louis W. Fauber, Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, Rodney D. Lanham, and Alan H. Nichols in March 1991, and to the unlawful refusal to recall Rodney Lanham, Nichols, Kenneth Derrick, and Thomas Osborne Jr., and WE WILL notify each of these employees in writing that this has been done and that the discharges and refusals to recall will not be used against them in any way.

LOW KIT MINING COMPANY, A SUCCESSOR TO SPANGLER COAL COMPANY, INC.

James E. Horner, Esq., for the General Counsel.
Forrest H. Roles, Esq. and *Mark A. Carter, Esq.*, of Charleston, West Virginia, for the Respondent.
Mark March Jr., of Charleston, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FINDINGS OF FACT

WALTER H. MALONEY, Administrative Law Judge. This case[1] came on for hearing before me upon a consolidated unfair labor practice complaint,[2] issued by the Acting Regional Director for Region 9, which alleges that Respondent Low Kit Mining Company[3] violated Section 8(a)(1) and (3) of the Act. The General Counsel alleges and the Respondent admits that Low Kit is a successor in interest to Spangler Coal Company and, since August 19, 1991, has continued to operate a coal mine which Spangler had been operating during the preceding year. The General Counsel alleges that Spangler had coercively interrogated job applicants, engaged in surveillance of the union activities of its employees, threatened job applicants and employees with discharge in the event of unionization, promised employees a wage increase and certain fringe benefits in order to discourage their union activities, threatened to close the mine in the event of unionization, and solicited grievances from employees during an election campaign in order to adjust them. The consolidated complaint further alleges that Spangler discharged eight employees for union activities.[4]

[1] The title of the case was amended at the hearing from Low Kit Coal Company to Low Kit Mining Company.

[2] The principal docket entries in the complaint cases are as follows: Charge filed herein by the United Mine Workers of America, AFL–CIO (UMWA or Union) against Spangler Coal Company, Inc., on March 25, 1991, in Case 9–CA–28402, and amended on April 22, 1991; charge filed herein by the Union against Respondent Low Kit Mining Company (Respondent or Low Kit) on November 22, 1991, in Case 9–CA–29108–1, –3, –4, –6, and –8; consolidated complaint issued by the Acting Regional Director of the Board's 9 Region for against Respondent Low Kit on January 10, 1992; Respondent's answer filed on January 23, 1992; hearing held in Charleston, West Virginia, on April 29 and 30, 1992; briefs filed with the undersigned by the General Counsel, the Charging Party, and the Respondent on or before June 22, 1992.

The principal docket entries in the representation case are as follows: Petition filed on April 12, 1991, by the Union in Case 9–RC–15876, seeking to represent certain of Respondent Spangler's employees in a bargaining unit composed of all production and maintenance workers employed at the Respondent's Pond Gap, West Virginia coal mine, excluding professional and office clerical employees, independent truckers, and supervisors as defined in the Act; consent election agreement approved by the Acting Regional Director for 9 Region on May 7, 1991; election held on May 17, 1991, which the Union lost by a vote of 9 to 12; timely objections to the election filed on May 23, 1991; order directing hearing on objections and consolidating the case for hearing with complaint cases issued by the Acting Regional Director for 9 Region 9 on June 28, 1991.

[3] Respondent Low Kit admits, and I find, that it is a corporation which operates a coal mine near Pond Gap, West Virginia, where it is engaged in the mining of bituminous coal. Based on projections, the Respondent will annually sell and ship from its West Virginia facility directly to points and places outside the State of West Virginia goods valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] These individuals are Louis W. Fauber, Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, Rodney D. Lanham, and Alan Nichols.

The parties agree that these individuals were offered reinstatement and, in a settlement agreement concluded with successor Low Kit, were paid varying amounts of backpay. However, the General Counsel requests that the agreement be set aside and that the matters alleged in Case 9–CA–28402 be litigated to a final order because, in its estimation, Respondent Low Kit failed to comply with various terms of the agreement, including a requirement that each alleged discriminatee be furnished an expungement letter. The General Counsel then alleges that four Spangler employees—Kenneth Derrick, Rodney D. Lanham, Alan H. Nichols, and Thomas Osborne Jr.—who had been laid off in the summer of 1991, were discriminatorily denied recall by Respondent Low Kit when vacancies arose in its work force. The Charging Party, who was the Petitioner in Case 9-RC–15876, requests that the election conducted on May 17, 1991, be set aside because, within the *Goodyear* period,[5] the Respondent engaged in surveillance of the union activities of its employees, promised employees a pay raise and then granted that raise, and engaged in other misconduct which affected the result.

The Respondent denies that it is guilty of any conduct which would warrant the Regional Director in setting aside the settlement of the first complaint case; denies the commission of independent violations of the Act by any supervisors; asserts that original layoffs were occasioned by a lack of sales; asserts that the individuals hired in October were more qualified for employment than the four alleged discriminatees for whom a discriminatory refusal to reinstate is alleged and further claims that it had no duty to reinstate anyone laid off by Spangler, regardless of whether or not vacancies arose; denies that it committed any acts of objectionable conduct within the *Goodyear* period; and further asserts that the Board should not order an election among Low Kit employees in order to remedy any conduct which might have been committed by Spangler in a Spangler election. On these contentions the issues herein were drawn.[6]

I. THE UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT ALLEGED

The events in this case arise from the mining of bituminous coal on Spangler Mountain, a minesite opened in December 1990, near Pond Gap in the Kelly's Creek area of Kanawha County, West Virginia. The principal and continuing figure in this extraction effort is and has been David L. Swango, owner and president of Logan Coal and Report Corporation (Logan) and secretary-treasurer of Respondent Low Kit Mining Company. The Spangler mine is a drift mine, as distinguished from a shaft mine, so access to coal is obtained by removing a portion of the hill or mountain and entering the coal seams horizontally. The mineral rights to the coal in question are owned by Scholl and Wilcher, Appalachian Coal Company (sometimes referred to in the record as the Addington brothers), Hammond and Arlee Dillard, and possibly others. These rights were assigned to Logan which, in the summer of 1990, contracted for the facing of the mountain (i.e., removal of a sufficient portion of the mountainside to permit lateral entrance) and the construction of access roads and drainage facilities. These holdings had previously been mined so care has had to be taken throughout the extraction operation to avoid, whenever possible, previously mined tunnels where extraction would result only in the removal of rock.

In December 1990, after the mine had been prepared for operation, Swango, acting through Logan, contracted with JG Leasing to perform the actual mining. JG Leasing is owned and controlled by Kenneth Stallsmith, who maintains an office in the same building in Charleston where Logan has its West Virginia office. JG Leasing owned (or leased) the mining equipment to be used in the Spangler mine. In turn, JG Leasing, with Swango's express permission, subcontracted the labor involved in the mining operation to the now-defunct Spangler Coal Company, Inc., which operated the mine from its opening on December 12, 1990, until Spangler abandoned the project on August 16, 1991.[7] Spangler Coal Company, Inc. was owned entirely by Dewayne ''Pete'' Atkins, who acted as mine superintendent during the Spangler era.[8] However, Adkins did not invest any of his own money in the concern. The obligation of both Spangler Coal Company, Inc. and its successor, Low Kit, has been to remove coal from the mine and place it at the entrance to the minesite, where it is picked up and carried away by independent truckers engaged by Logan. Title to the extracted mineral is vested in Logan.

In December 1990, Atkins began to recruit employees in the various classifications involved in a mining operation.[9] Atkins hired about 20 men who worked initially on two shifts of 10 hours each and also on a so-called maintenance shift. Later, the hours of each shift were reduced when Spangler began a ''hoot owl'' or midnight shift and two other mining shifts of 8 hours' duration.

It is uncontroverted that, during several hiring interviews which took place either in December 1990, or shortly thereafter, Atkins made it clear that he wanted to operate the Spangler mine on a nonunion basis. Alan Nichols testified credibly that, after examining his resume, Atkins referred to the fact that Nichols had worked for Ray Lyons. Adkins noted that Ray Lyons was a union operation [10] and observed, ''This is a non-union operation and it will run non-union.'' Adkins then went on to say that the Addington brothers, the

[5] The Petition in Case 9–RC–15876 was filed on April 12, 1991, so any conduct alleged as objectionable would have to take place on or after that date. *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962).

[6] Certain errors in the transcript have been noted and corrected.

[7] At all times material, the West Virginia state permit to operate the mine was in the name of Logan and the property was posted to reflect this fact. Others who have performed mining operations have done so on the strength of Logan's permit.

[8] Adkins owned Spangler, served as its president, and was its chief operating supervisor. He hired and fired all of Spangler's employees. As such, he was a supervisor within the meaning of the Act.

[9] These classifications include foremen, roof bolters, fire bosses, beltmen, electricians, shuttle car operators, loader operators, cutters, drillers, and ordinary laborers. Recently, the Respondent installed a machine known as a continuous miner and now has need of miner operators. Some miners can perform more than one of these functions. Some mining functions such as electrician require a special license or certification by West Virginia state authorities.

[10] Throughout the West Virginia coal fields, most mining operations are widely known as being either union or nonunion, so it is a simple matter for any experienced miner or mining official to determine from a resume whether an applicant has been a member of the UMWA simply by learning where he has worked.

lessors of the mineral rights, had always run nonunion and would refuse to run union, adding that Adtington would ''pull the contract'' if the mine ran union. When Paul Bartley was interviewed by Atkins, Atkins told him that, if anyone brought up anything about unionization, Atkins would close the mine before he would let the union come in. When Rodney D. Lanham was interviewed for a job, Atkins asked him if he had heard anything about a union at the mine. Lanham replied, ''No.'' During his interview, Louis Fauber was told by Adkins that the mine was nonunion and that Atkins intended that it would stay that way because it was necessary to operate nonunion in order to maintain a good relationship with the Addington brothers. Mickey Hager was interviewed by both Stallsmith and Adkins. Stallsmith told Hager that ''we are not going to have any unions in the mine.'' Adkins then noted that the Addington brothers owned the mine and ''if it went union, they probably wouldn't be able to sell the coal.''

During the first months of the Spangler operation, Spangler Coal Company, Inc. did not take any withholdings for taxes or social security from employee paychecks. This practice was a matter of concern to several employees who were afraid that the failure of the Company to withhold portions of their earnings would mean not only a large tax bill for them at the end of the tax year but also mean that they were being treated as contract laborers and hence not covered by workmen's compensation and unemployment compensation. (At a later time, Spangler actually asserted such a defense to an employee claim for compensation.) They asked Adkins about the Company's failure to withhold taxes and were told that Spangler was a small outfit that could not afford to withhold taxes and social security. As a result of their concern, Nichols, acting on behalf of several others, called Mark March, an organizer for the UMWA, and informed March that employees at Spangler were interested in union membership. Nichols then obtained union designation carts from March and began soliciting memberships, both on and off the Company's premises. Between February 13 and March 14, some 15 out of approximately 20 or 25 employees signed. Five of the signatures were obtained by Nichols.

At the outset of the union drive, March sent a letter to company officials informing them that the UMWA was in the process of organizing their employees. On or about February 16, Stallsmith[11] and Adkins held a meeting of night-shift employees toward the end of the shift. Stallsmith mentioned that March had written the Company a letter and read the contents of the letter to them. He told them that, when the UMWA comes into a mine, the miners have no say in what goes on. He further stated that the Company would not run the mine with UMWA involved and, in such an instance, would ''pull the plug'' on the operation. Stallsmith then told the employees that, if they had any problems, they could see him or Adkins to work them out. Stallsmith gave the assembled group his telephone number for this purpose.

A few days later, Adkins had a meeting with employees on the night shift. On that occasion he told them that he knew that organizing was in progress and was also aware of the identity of the person who was doing the organizing. He accused the unnamed organizer of causing a lot of men to lose their jobs. He also told the assembled employees that he knew of a union meeting which was going to take place at Clay[12] the following weekend, adding that he would know the identities of everyone who attended. He closed his remarks with the admonition that he would not run the mine on a union basis.

While the ensuing shift was in progress, Nichols left the mine and went to the office to speak with Adkins. He told Adkins that it was he who was circulating the union cards. He said that he needed his job and that he did not want other miners to lose their jobs, so Adkins could forget about the union cards. Nichols assured Adkins that he would not turn them in. Adkins responded by taking out his books and showing Nichols what the mine was making. He said it was a small operation and could not presently afford a union, adding that in a year he might be able to afford a union, but ''we can't do it now.''[13]

On or about March 10, Foreman Danny Beasley had occasion to speak with Osborne while both men were on a shuttle car in the mine. Beasley asked Osborne what he thought of the Union. The record does not reflect Osborne's reply. In another conversation with Lester Lanham, Beasley told Lanham that, if the Union came in, Adkins would shut the mine down and pull the equipment out of it. Shortly before the March 15 discharges, Beasley asked employee Hilton Washington if Washington thought Rodney Lanham would vote for the Union. Washington replied that he did not know. Another inquiry concerning the progress of the organizing drive was made by Adkins to Fauber. In a conversation which took place in the mine office, Adkins asked Fauber what he knew about the organizing drive. Fauber said he had not heard anything, whereupon Adkins informed him that the Company had received a letter from the UMWA district office telling them that a drive was in progress. Fauber expressed surprise that he had not heard anything since he knew everyone at the district office and had been president of the UMWA Local at the Moore's Creek mine for 6 years, as well as a member of the mine committee and the safety committee. At that point, Adkins terminated the conversation.

Within a few days of his conversation with Adkins, Fauber experienced car trouble on the way to work. His truck caught on fire and, after extinguishing the flames, had to be parked

[11] Stallsmith acted as bookkeeper for Spangler. He visited the premises from time to time and played a role in Spangler's hiring activities. As noted previously, Stallsmith controlled JG Mining and made the decision to contract with Spangler (i.e., Adkins) for the labor necessary to run the mine. There is little doubt that he exercised a pervasive influence over the mining operations, notwithstanding the fact that Adkins was not only superintendent but also the sole officer of Spangler. Adkins testified that he looked to Stallsmith for advice on labor relations. Danny Beasley, Respondent Low Kit's president and mine superintendent, testified that Stallsmith had authority to lay off Spangler employees. Accordingly, Stallsmith was a Spangler supervisor within the meaning of Sec. 2(11) of the Act, although, after Respondent Low Kit took over, Stallsmith no longer played any role in the new operation. Moreover, his remarks concerning the unionization of the mine were made to employees in Adkins' presence, indicating that Adkins agreed with them and endorsed Stallsmith as a spokesman for Spangler.

[12] UMWA meeting was scheduled to take place the following Sunday afternoon in the high school in the town of Clay in Clay County, the adjoining county to Kanawha County.

[13] There is some confusion in the record whether the Adkins meeting or the Stallsmith meeting took place first. There is no doubt that both meetings occurred and that they occurred within a few days of each other.

on the side of a road about 3 miles from the mine. According to Fauber, the truck contained personal tools valued at between $1500 and $2000. He rode the rest of the way to work with miner Ernie Porter. Upon arriving to begin his night-shift job, he approached the day-shift electrician, Virgil Gillespie, and asked Gillespie to stay over on Fauber's shift so Fauber could attend to his vehicle problem. Gillespie refused. Fauber then told Adkins about the problem and asked permission to leave to attend to his truck, saying that he had no other way to get to work than by using the truck and that it was sitting on a roadside with valuable equipment stowed away on the floor. Adkins refused, telling Fauber that he needed him in the mine. When Fauber told Adkins that he simply had to leave, Adkins replied that, if Fauber did so, the Company would have another electrician at the mine the following day and Fauber could simply turn in his miner's light and charger when he picked up his final paycheck. Fauber left and followed the instructions that Adkins outlined. He did not work again at the mine.

On Friday, March 15, Nichols and seven other miners on the night shift were fired. They were given identical letters in their pay envelopes which read: ''You are terminated for lack of work this date.''[14] Nichols asked Adkins why he had been selected for discharge since he had more seniority than other miners who were being kept. Adkins replied that seniority did not mean anything at the Spangler mine. The discharged miners decided to establish a picket line the following Monday and did so at the bottom of the hill about a quarter of a mile from the mine entrance, where the road leading to the mine intersects the county road. They used homemade signs claiming that Spangler was guilty of an unfair labor practice. Many if not most of the employees who had been retained on the Spangler payroll observed the picket line, so the mine was virtually shut down. Two or three men were hired during the strike and they crossed the line.[15] On the following Saturday afternoon, Adkins held a meeting with all the miners, both those who had been discharged and those who hat been retained, and told them that everyone could go back to work beginning on Sunday night. The picket line was removed and, by the following Wednesday, everyone was back at work.

Early in April, Adkins orally promised employees a wage increase and health insurance benefits. The record is unclear as to whether this promise was made before or after April 12. It is quite clear that, on April 29, Adkins wrote each employee a letter which read as follows:

> As you may know, the UMWA wants to represent you. We believe that a secret ballot election is the best way to determine what our employees really want. Therefore, we have agreed to an election here on May 10, 1991, which will be supervised by the National Labor Relations Board. I will give you more information on the election when we have the details worked out.
>
> The law requires that I give your name and address to the Labor Board, and they will give that information to the UMWA. The UMWA may try to contact you. Remember, the law says you to not have to talk to their organizers if you do not want to.
>
> I've heard a lot of stories about things I've said in the past and I want to set the record straight now. Whether this company goes union or stays union-free is your choice and you are free to vote the way you believe is best.
>
> I do not think the UMWA has anything to offer us, and I am asking you to vote NO. The coal industry is real tight right now and every penny counts. The way to be successful is through team work. With their big national contract, the UMWA is famous for asking for more than small companies can afford and they are known for putting a wedge between employees and management. We don't need that kind of interference.
>
> When you hired on, I told you that you would get a decent day's pay for your work and that wages and benefits would improve when we could afford them. We have lived by that promise, giving you a $2.50 an hour raise and insurance staring June 1. Please, give this Company a chance to make it, without UMWA interference. Vote NO on May 10.

At the representation election held on May 17 (not May 10), the Union lost by a vote of 9 to 12 and timely objections followed.

On the day following the election, Atkins called Nichols into the office when he reported to work. He told Nichols on this occasion: '' The election is over. Now I can say what I want to say. If that union had of went in here, I would have pulled the plug on this mine.''

On July 8, Randy Basham[16] phoned Nichols and told him that he was being laid off for poor sales. He also called Osborne and told Osborne that he was being laid off until further notice because there was no more work. He gave no additional reason. Two weeks later, Adkins phoned Osborne and said he wanted to put him back to work as a belt man on the day shift. Osborne returned and worked till August 12, when he suffered a hand injury. On the day before he was injured, Osborne asked Beasley, who by then was running the mine, for time off to meet with a Board agent who was investigating the original charge in this case. Beasley agreed. On the following day, while Osborne was at work shoveling a tail piece with a busdust shuttle, he moved his shovel underneath the belt. The belt grabbed the shovel and jerked him into the tail piece. He suffered severe contusions and was taken to the emergency room of a nearby hospital, where a splint was placed on his arm. Osborne phoned Stallsmith to report the injury and Stallsmith told him he was laid off. That evening Beasley came to Osborne's home to collect his miner's light and charger.[17] Osborne has not

[14] The other individuals who were terminated were Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, and Rodney D. Lanham.

[15] Adkins phoned Derrick at his home and asked him if he wanted to continue to work. Derrick replied that he did but that he was not going to cross the picket line.

[16] Basham was variously described in the record as mine clerk, partsman, or outside man. He frequently phoned employees to notify them whether or not to come to work. Basham was the Company observer at the May 17 election.

[17] Each employee who works underground is issued a miner's light and a charger which they are entitled to take to their homes. The charger is used to recharge the miner's light with electricity after

Continued

worked for the Respondent since that time. Derrick and Rodney Lanham were also called by Basham on July 8 and told that there would be no more work until further notice. Neither has worked for the Respondent since that date.

Late in July, Adkins left the mine as superintendent and went back to work for his former employer, Sharpless Coal Company. Swango placed Beasley in charge of the operation. Adkins testified that his company, Spangler, had lost a lot of money and could not afford to continue to operate. The mine continued to operate under the name Spangler Coal Company, Inc., until August 16, although the payroll for the final week was met by Swango rather than from Spangler earnings.

Swango established a new corporation, Respondent Low Kit, and is its sole stockholder. Beasley became the corporate president and was appointed by Swango to be mine superintendent, a position he now holds. Swango has the title of secretary-treasurer. Swango arranged to take control of the mining equipment which JG Leasing either owned or leased and the mine began operations by Respondent Low Kit under the Logan mining permit, which was reassigned from Spangler to Low Kit. On Monday, August 19, when Spangler employees reported for work, they were told of the changeover and were offered the opportunity to continue working for Low Kit under the same terms and conditions which had existed under Spangler. All accepted.

Swango began to exercise a more intimate involvement with the Low Kit operation than he did with the Spangler operation, although he is not personally present at the minesite each day. Decisions to hire new employees are made jointly by him and by Beasley, both with respect to the need for more personnel and in the selection of those to be hired. Beasley acknowledged on the record that he is working for Swango.

The Regional Office determined that there was merit to the charge filed against Spangler in Case 9–CA–28402 and undertook an effort to settle it. Settlement discussions took place during September, 1991. On the recommendation of counsel, Swango agreed to settle the case and signed a settlement agreement which required Low Kit, as the successor to Spangler, to cease and desist from engaging in certain conduct which would constitute independent violations of Section 8(a)(1) of the Act, to make whole eight named employees who had been discharged in the spring of 1991 when the mine was being picketed, to send them expungement letters, and to find a job for discriminatee Steve A. Browning. The agreement did not provide for reinstatement. The total amount of backpay was calculated to be $9000, a sum which Swango provided either out of Logan's resources or his own. The settlement was approved by the Acting Regional Director on or about September 25, 1991.

While these efforts were in progress, Respondent hired four new employees to replace individuals who quit. On October 2, it hired Michael Laws and his brother, Roger D. Laws, as laborers. On October 17, Ernest Grayley was hired to operate a shuttle car and, on October 28, Jerry Hostine was hired as a beltman. Beasley testified that former Spangler employees had no recall rights under Low Kit's hiring policies and that none had filed timely applications for employment with the newly formed company, a requirement which was apparently instituted in September. Respondent did not advertise for new employees when vacancies arose in September and October. It simply ''put out the word'' that it was looking for someone in a particular classification. ''Putting out the word'' basically meant informing current employees Virgil Gillespie, Terry McDerment, Walter McDerment, Roy Williams, and possibly others of the Respondent's intention to hire and asking them to recommend someone of their acquaintances who might be suitable. It is admitted that Nichols, Osborne, Derrick, and Rodney Lanham were never informed of any vacancies and were not offered employment.

When they learned about the hiring of four new employees, Nichols, Osborne, and others set up a picket line in front of the mine for a period of several days late in October to protest the failure of the Respondent to recall them. Their effort did not accomplish its desired result. While the settlement agreement which the Respondent signed in Case 9–CA–28402 required it to send the employees named in the charge a letter notifying them that their personnel records had been expunged of any adverse information arising out of their discharges in the spring of 1991, no such letters were ever sent.

II. ANALYSIS AND CONCLUSIONS

A. *Setting Aside the Original Settlement Agreement*

The General Counsel contends that the settlement agreement in Case 9–CA–28402 should be set aside for several reasons. He maintains that the Respondent violated the agreement by failing to send expungement letters to employees who had been named in the charge. He further contends that the Respondent failed to post the notice in a conspicuous place, as conventionally required by Board settlement agreements and notice-posting orders, and that the notice which the Respondent did post was only a part of the notice which made up the totality of the agreement.[18] It is clear beyond peradventure that the Respondent never sent expungement letters to any employees.[19] These letters are formal written notifications that personnel records have been expunged of any adverse matters arising out of their discharges and that such discharges will not be used as a basis for future disciplinary actions. This breach of the agreement is an ample

each day's use. Upon termination, both the miner's light and the charger must be returned to the Company.

[18] The original notice which was posted included only the first page of a two-page notice and omitted the portion which was required to be signed by the Respondent or its agent.

[19] The copy of the settlement agreement bearing the Acting Regional Director's signature, dated September 25, 1991, embodies the totality of the agreement between the parties and is the document whose terms controlled the obligations of the Respondent. This document includes the signature of the Respondent's counsel and also includes a notice which was two pages in length. The second page of the notice—the page containing the space for the signature of the Respondent's authorized representative for notice-posting purposes—recites the Respondent's obligation to send out expungement letters to discriminatees. This is the agreement which the Regional Director set aside. Accordingly, I conclude that the Respondent was obligated by the terms of its undertaking to send such letters. Had it done so in a timely fashion, those letters would have reached the recipients during the same period of time the Respondent was actively soliciting employees to fill the job vacancies which arose in late September and early October.

basis for setting aside the settlement in question and, for that reason, I do so. *Middle Earth Graphics*, 283 NLRB 1049, 1057 (1987). Moreover, the Respondent violated the Act subsequent to executing the settlement by failing to recall or hire four union activists. These unfair labor practices also constitute a breach of the agreement and an ample basis for setting it aside. The other grounds asserted by the General Counsel for setting aside the agreement present closer questions of law and fact which are not necessary to resolve, and I decline to do so.

B. *The Independent Violations of Section 8(a)(1) of the Act*

(1) Respondent Spangler violated Section 8(a)(1) of the Act when Adkins coercively interrogated job applicants and threatened to close the mine in the event of unionization in the following instances:

(a) His statement to Nichols that the Addington brothers, the lessors of the mineral rights, have always run nonunion, would refuse to run union, and would ''pull the contract'' if the mine ran union.

(b) His statement to Bartley that he (Adkins) would close the mine before he would let a union come in.

(c) His question to Rodney Lanham if he had heard anything about a union at the mine.

(d) His statement to Fauber that the mine was union and that he (Adkins) intended that it would stay that way because it was necessary to operate nonunion to maintain a good relationship with the Addington brothers. Implied in this statement is an assertion that the mine would close if it became unionized. In the context of other statements made by Adkins in the course of other job interviews, his statement to Fauber has and could have no other meaning .

(2) During Hager's hiring interview, Stallsmith told him that ''we are not going to have any unions in the mine. ''Adkins added that, ''if it went union, they probably wouldn't be able to sell the coal.'' Both statements are implied threats to close the mine in the event of unionization and are violations of Section 8(a)(1) of the Act.

(3) During the organizing drive, Adkins parked his truck near the point on the entrance to the property where March was handing out union literature to passing employees. This act constituted illegal surveillance of union activity in violation of Section 8(a)(1) of the Act.

(4) When Stallsmith told employees at a company meeting that the Company would not run the mine with the UMWA and would ''pull the plug'' in the event of unionization, he uttered an illegal threat which constitutes a violation of Section 8(a)(1) of the Act.

(5) When Stallsmith told employees in the course of a coercive talk that, if employees had any problems, they could see him or Adkins and work them out, he was soliciting grievances during an organizing campaign with a view toward adjusting them in violation of Section 8(a)(1) of the Act.

(6) Adkins told employees that he was aware of the identity of the person who was engaged in union organizing. He also stated that he knew of a forthcoming union meeting at Clay and would know the identities of anyone who attended that meeting. These statements constitute the creation of the impression of surveillance of union activities and a threat to engage in the surveillance of union activities in violation of Section 8(a)(1) of the Act. Adkins' further statements that the in-plant organizer would cause a lot of men to lose their jobs and that the mine would not run on a union basis constitute threats to discharge employees for engaging in union activities and a threat to close the mine in the event of unionization in violation of Section 8(a)(1) of the Act.

(7) Foreman Danny Beasley's inquiry to Osborne as to what he thought of the Union, made as it was in the context of intense antiunion threats and other illegal activity, constitutes a violation of Section 8(a)(1) of the Act.

(8) Beasley's statement to Lester Lanham that Adkins would shut the mine down and pull the equipment out of it in the event of unionization is an illegal threat which violates Section 8(a)(1) of the Act.

(9) Beasley's question to Washington about whether Washington thought Rodney Lanham would vote for the Union was coercive interrogation in violation of Section 8(a)(1) of the Act.

(10) Adkins' question to Fauber concerning what Fauber knew of the union organizing campaign was coercive interrogation which violated Section 8(a)(1) of the Act.

(11) Early in April, Adkins told employees that they would be receiving wage increases of $2.50 an hour and would also be receiving medical insurance. Offering financial inducements to employees during an organizing campaign is a classic violation of the Act. It is no defense to this employer that it had initially told some employees during job interviews that it hoped to improve their compensation package after the mine operation improved.[20] The timing of his initial promise coincided with the onset of the organizing drive, not some objective event with historical significance, such as a regular yearly wage review. By promising an increase in wages and benefits, Respondent violated Section 8(a)(1) of the Act. On April 29, after the representation petition was filed and when negotiations leading to an election were in progress, the Respondent renewed this promise in writing in a letter sent to each prospective voter in the election. In the test of that letter, the bulk of which was devoted to disparaging the UMWA, the Respondent directly tied the wage increase to the forthcoming election by the assertion that no one needed the union to improve their lot as the Respondent's employees. By repeating its promise to grant an increase in wages and benefits in the April 29 letter, the Respondent again violated Section 8(a)(1) of the Act.

C. *The Discharge of Eight Miners in March 1991*

The General Counsel alleges that the Respondent discharged Louis W. Fauber on March 11 and seven other employees on March 15 because of their union activities. It was this allegation which, inter alia, was settled by the Respondent Low Kit in the fall of 1991 but which now must be litigated on its merits because the settlement of that case has been set aside. The Respondent's defense is that Fauber was discharged because he left work to attend to a personal emergency relating to a truck breakdown and that the other seven were discharged because of lagging coal sales.

The actions of the Respondent in March 1991 must be evaluated against the background of intense antiunion animus which frequently lapsed into illegal and intimidating conduct.

[20] His estimate to Nichols was that it might take a year until the mine was running well enough to afford a union.

In terms of its intensity, the Respondent's campaign against unionization adopted a no-holds-barred approach so its actions and its defense to charges levelled against it will be reviewed in that context. All eight of the ''March discriminatees'' had signed union cards within a month previous to their discharges.[21] Nichols admitted to Adkins that he was the one who had been circulating these cards. Within days of his discharge, Fauber had told Atkins that he was acquainted with UMWA district officials, had been a local president at a former job, and had also been a member of the mine committee and the safety committee. Atkins engaged in surveillance of the activities of the Union's staff organizer when he was handing out union leaflets at the entrance to the mining property and company inquiries were being made of employees concerning union sentiments of others. As noted earlier, because of the stereotyping of most mining companies as either union or nonunion operations, Atkins could easily tell which of his employees had or had not been members of the UMWA simply by looking at their resumes and noting where they had previously been employed. He knew of Nichols' and Fauber's union activities or union work history because each of them had informed Atkins about it. I conclude that Adkins knew that each of the men he discharged in March was a union sympathizer.[22]

The first of the discharged employees, Louis W. Fauber, was an electrician and a skilled employee in a job category which requires state licensure. Employees in that category are in short supply, a fact reflected in the wage rates for electricians which were approximately $6 an hour above those paid by the Respondent to most of its other employees. On the day Fauber was discharged, he was due at work at 4 p.m. to perform the duties of electrician on the night shift. His truck caught fire about 3 miles from the mine as he was driving to work and he had to leave it at the side of the road. He rote the rest of the way with another miner. He asked the day-shift electrician to cover for him so he could have his truck removed but his request was refused. He told Atkins of the problem, indicating that he had a truck full of valuable tools at a nearby roadside,[23] and asked permission to leave and make arrangements to have the vehicle removed, fearing vandalism or worse if the truck remained unattended for any period of time along a remote country road. Adkins refused, telling Fauber he needed him to work as the night- shift electrician. Fauber then told Adkins he had to leave, whereupon Atkins told Fauber he would have another man replace him the following night. He instructed Fauber to turn in his light and charger. Fauber left and did not return. When Fauber filed for unemployment compensation, the Respondent defended against his claim with the assertion that he had quit his job.

In this case, the Respondent does not claim that Fauber quit but that he was discharged for cause, namely, for leaving the job without permission. It points out that Adkins needed an electrician on the night shift to make any electrical repairs which might arise and that Fauber's absence would leave the Respondent in a difficult position. It is clear from this recitation of facts that both parties were in a tight position. However, it is possible for the mine to operate without an electrician for at least a short while, but Fauber's truck needed immediate attention or Fauber would not be able to get to work the following day and could conceivably suffer theft or vandalism of unattended property. There was no consideration by the Respondent of Fauber's position, although Fauber made an effort to have someone fill in for him during a brief absence necessitated by a personal emergency. There is simply no record evidence to support the Respondent's contention that the second shift at the mine would automatically shut down if Fauber were not present. Fauber had an excellent work record, rarely missed a day, and worked an average of 50 hours a week. He had recently made known to Adkins his previous affiliation with the UMWA and the fact that, at another mine, he was not only a union member but a union leader. In light of these factors, I conclude that the shifting reasons offered by the Respondent for Fauber's discharge were pretextual and that the bind which Fauber found himself in on March 11 presented the Respondent with both an opportunity and an excuse to remove from its payroll a potential source of aggressive unionism. Accordingly, I conclude that, by discharging Louis W. Fauber, the Respondent herein violated Section 8(a)(1) and (3) of the Act.

The other seven ''March discriminatees'' were discharged 4 days later, all at the same time and for the same asserted reason. That reason was the loss of a coal sale. There is no statistical or other record data supporting the Respondent's claim that its sales were down and that the layoff of one third of its work force was in order. Moreover, the individuals who testified in support of this naked claim were witnesses whose credibility is seriously deficient. It should be noted that all seven discriminatees were not merely laid off until orders picked up, an event which apparently happened in the course of the following 10 days. The notices which each received were termination notices, meaning that, even if the Respondent's business improved and a need arose for additional men, others could and presumably would be hired in their places. The record contains no suggestion that any of the discriminatees were unsatisfactory employees. Indeed, most of them were miners with between 10 and 20 years of experience in the industry and most could perform several different functions in any mining operation. The action by the Respondent on March 15 was not merely an effort to trim its payroll in the face of an economic downturn. It was an effort to eliminate particular people.[24]

The emptiness of the Respondent's asserted defense was made clear when, following a week of picketing which virtually halted production, coal sales suddenly boomed to the point where the entire night shift had to be returned to duty and a full complement of miners was required to meet production demands. The discharges in question were made by a virulently antiunion employer who had repeatedly said that it would fire employees and close the mine in the event of

[21] Leroy Halstead testified without contradiction that he signed a card while riding to work with discriminatee Bartley, but his card is not among the 14 which were placed in evidence by the General Counsel.

[22] The fact that the Respondent did not discharge other employees who were also union sympathizers is irrelevant. It had to keep someone on the payroll to operate the mine, but it used the week of the strike to hire new employees who were willing to cross a picket line.

[23] At the hearing, Fauber estimated that he had tools in his abandoned truck valued at between $1500 and $2500.

[24] No consideration was given to seniority in selecting employees for layoff. Indeed, Nichols was told that the Respondent did not even recognize seniority in its work force.

unionization. The Board should take the Respondent at its word. Accordingly, I find that, by discharging seven employees named in the consolidated complaint in March because of their union sympathies and affiliations, the Respondent herein violated Section 8(a)(1) and (3) of the Act.

D. *The Refusal to Reinstate Derrick, Osborne, Nichols, and R. Lanham*

The General Counsel makes no contention that Derrick, Osborne, Nichols, and R. Lanham were again discharged for union activities on July 8. They were laid off for lack of work. Osborne was recalled 2 weeks later, only to suffer an industrial injury on August 12. None of them has worked since those respective dates. The essence of the General Counsel's allegation is that they were discriminatorily denied recall later in the year.

All four of the ''fall discriminatees'' had signed union cards and all had given strong evidence their union sympathies in March, either by picketing to protest the March terminations or by observing the picket line which had been established at the entrance to the mine property. In his testimony, Swango described their strike as an ''insurrection.'' When vacancies arose at the mine in September and October because incumbent miners had quit, none of the laid-off employees was even notified of job openings and strangers to the operation were hired as replacements. To explain this peculiar situation, the Respondent advanced several transparently false excuses.

Respondent notes that, between the layoffs in question and the time that vacancies arose, Low Kit had taken over from Spangler. According to its argument, Low Kit had no obligation to recall Spangler employees who were on layoff. The second contention is that, while the Spangler employees in question may have been laid off, they were in fact discharged. Thirdly, the Respondent claims that it adopted a policy of considering for employment only those employees who had made fresh applications when vacancies arose and that none of the four miners in question had their applications on file during the critical period when hiring decisions were being made.

Respondent may not have a legal duty to observe seniority or to reinstate laid-off Spangler employees but it had a legal duty to avoid discrimination on the basis of union sympathies and affiliations in establishing hiring policies and in making hiring determinations. All of the miners who were separated on July 8 were given the clear impression that they were being laid off, not discharged. Basham, the Company clerk, told at least two of the men whom he phoned that they were being laid off ''until further notice.'' That notice never came, even though job openings arose in September and in October.

Low Kit admits that it is a successor to Spangler. Both employers operated on the same mining permit, one which had been issued by the State of West Virginia to Logan and which has at all times material been under Swango's control. Indeed, it could not do otherwise since both are merely an extension of the interest and control of a single individual, David Swango. Swango completely controlled the labor relations policies of both operations. He testified that he did not get into the day-to-day operations and decision making of Spangler as closely and as intimately as he has done in the case of Low Kit. However, this is not because he could not have done so but because he elected not to do so. Spangler is so completely bound up with Low Kit that Low Kit elected to settle Spangler's unfair labor practice case, to post notices which normally Spangler would have been called upon to post, and pay out $9000, a sum which originated from Swango, to meet the backpay liability due under the terms of the Spangler-Low Kit agreement. The present mining operation is the same operation as the Spangler mine, the superintendent of the Low Kit operation was a mine foreman under its predecessor, and there was no hiatus in the operation when the changeover took place. Employees on the Spangler payroll were told, on or about August 19, that henceforth they would be Low Kit employees and would be working under the same terms and conditions as before. None of them were required to fill out new job applications in order to continue their employment and there was no reason for them to do so, since they were all well known to Low Kit management and Low Kit presumably had the Spangler personnel and payroll records containing the original applications of all incumbent miners. However, when it came to filling vacancies a few weeks later and facing the possibility that recently laid-off employees might make application, a new and wholly arbitrary hiring requirement was suddenly invoked to justify ignoring their possible candidacies. It was established for no other ostensible reason than to provide the Respondent with an excuse for not hiring the discriminatees.

Following his layoff in July, Nichols had no further contact with the Respondent until the new employees were hired in late September and early October. However, Osborne, R. Lanham, and Derrick had several contacts. Osborne was rehired, injured in August, and, in effect, discharged immediately following the injury. Upon notifying Stallsmith that he had received an injury, Osborne was told by Stallsmith that he was laid off. Beasley immediately visited Osborne's house to pick up his miner's light and charger. This occurred within a few days after Osborne had told Beasley that he needed time off to speak with a Board agent who was then investigating a pending unfair labor practice charge.

Sometime later, Osborne had occasion to speak personally with Swango. He told Swango about his injured hand and let Swango know that he was interested in returning to work. Osborne was still under a doctor's care at that time. Swango told Osborne to let him know when he received a medical release and Swango would put him back to work. On September 9, Osborne phoned Basham and told him that he had a doctor's release permitting him to go back to work. He also spoke to Beasley the same day and gave him the same information. Beasley's only response was ''Okay,'' but Beasley did not tell Osborne to come back to work and Osborne was never recalled.

During the week of October 18, Rodney Lanham went to the mine and asked Beasley for a job. Beasley told him that the Company was not going to do anything until they got public power in the mine. Until that time the mine had been operating on battery-powered electrical source. During the course of a weekend, it changed over to public power from Appalachian Power Company. The following week Lanham and Osborne, who are related both to Beasley and to each other, went back to the mine and were given the same excuse for not hiring by Beasley. Lanham filled out a job ap-

plication and gave it to Beasley but has heard nothing since that time.

When Derrick applied for reinstatement in September, Beasley told him that he would not be hiring anyone because the Company was ''working on a generator.'' When he went back to the main office a second time, he was given the same excuse. In fact, the power changeover had nothing to do with the Respondent's hiring activities and was simply a put off to avoid telling these applicants that the Company was not doing any hiring, a fact which all of them would soon come to learn was false. When they did find out that Respondent had been hiring when they were being told the contrary, they set up a short-lived picket line.

When the Respondent undertook to hire four employees in late September and early October, it solicited applicants by ''putting out the word.'' The people Beasley principally relied upon to refer job seekers were Gillespie, the McDerments, and Williams, all of whom had demonstrated their loyalty to the Company back in March by crossing the picket line which had been established to protest the Company's March unfair labor practices. All the miners they referred lived, as did they, a considerable distance from the mine in Boone County, while the four discriminatees were comparatively close at hand. Notwithstanding the availability and readiness of these individuals to return to work, Beasley made no effort to contact them and to let them know that the Company was hiring. This omission on his part is all the more peculiar in light of the fact that two discriminatees, Derrick and Osborne, were close relatives, either by blood or marriage, and make their living in an industry where family ties are an important feature of employment ''networking.'' They were refused employment when they came around seeking work because they had not placed new job applications on file, but they had not filed any applications because they did not know of any vacancies or of the new requirement that former Spangler employees execute application forms and provide Low Kit with the information it already had.

It is quite obvious that Beasley did not let former Spangler employees know of job openings because he did not want to hire them when openings arose. It is equally obvious that such excuses as their failure to file timely application forms or Beasley's failure to notify them of openings were merely ways of avoiding a confrontational refusal to hire. That confrontation finally arose late in October when a picket line was established in front of the mine property. However, at that time, all vacancies had been filled.

Beasley was well aware of the desire of these individuals to return to work long before he ''put out the word'' seeking other applicants. The Respondent's reason for avoiding the reemployment of four experienced miners whose ability and performance were without reproach was that they were not only union activists but activists who had demonstrated their attachment to the UMWA and to each other by establishing a picket line in front of the mining property during the March ''insurrection.'' By failing to hire them, or even to consider them for hire in September and October when job vacancies arose, the Respondent herein violated Section 8(a)(1) and (3) of the Act. I so find and conclude.

E. *Objectionable Conduct Affecting the Result of the May 17 Election*

Following its defeat at the May election, the Charging Party filed timely objections asserting that the election should be set aside because of employer interference. Those objections include the claim that the company observer at the election was a supervisor, that the voter eligibility list which the Company furnished excluded the names of certain unit employees who were thereby denied the right to vote, that the employer engaged in surveillance of the Charging Party's distribution of literature during the critical preelection period, and that the employer, during that same period, promised employees additional wages and benefits if they would vote against the Union.

As noted above, the Respondent promised employees pay raises and health insurance benefits, both orally and in writing, not long before the election. These promises, made in the course of an election campaign and in anticipation of an election, are classic unfair labor practices. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). The letter of the Respondent to its employees, quoted above, ties the raises to a ''Vote No'' request in clear and unmistakable terms. While there is some doubt as to when the oral promises were made, there is no doubt that the offending letter was written well within the critical period. As it constitutes an unfair labor practice, and a serious one, sending the letter also constitutes objectionable conduct warranting the setting aside of the election. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Since I have recommended that the May 17 election ought to be set aside on this ground, it is unnecessary to pass upon the other contentions of the Charging Party and I decline to do so.

On these findings of fact and conclusions of law, and on the entire record considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Low Kit Mining Company is now and, at all times material has been, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Low Kit Company is a successor in interest to Spangler Coal Company, Inc.

3. United Mine Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. By discharging Louis W. Fauber, Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, Rodney D. Lanham, and Alan H. Nichols in March 1991, because of their membership in and activities on behalf of the Union; and by later failing and refusing to recall Kenneth Derrick, Rodney D. Lanham, Alan H. Nichols, and Thomas Osborne Jr., because of their membership in and activities on behalf of the Union, the Respondent violated Section 8(a)(3) of the Act.

5. By the acts and conduct set forth above in Conclusion of Law 4; by coercively interrogating employees about their union activities and the union activities of other employees; by promising employees increases in wages and benefits in order to persuade them to abandon their support for the Union; by soliciting grievances from employees and by threatening to close its mine if they selected the Union as their bargaining representative; by engaging in surveillance of the union activities of employees; and by threatening to

place their union activities under surveillance, the Respondent herein violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive and evidence a disposition on the part of this Respondent to violate the rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). The recommended Order will require the Respondent to offer full and immediate reinstatement to Louis W. Fauber, Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, Rodney D. Lanham, Alan H. Nichols, Thomas Osborne Jr., and Kenneth Derrick to their former or substantially equivalent employment, without prejudice to their seniority or to other rights and benefits which they previously enjoyed, and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth*[25] formula, with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also require the Respondent to post the usual notice, informing employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Low Kit Mining Company, a successor to Spangler Coal Company, Inc., Pond Gap, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities and sentiments and the union activities and sentiments of other employees.

(b) Promising employees increases in wages and benefits in order to get them to abandon their support of the Union.

(c) Soliciting grievances from employees during an organizing campaign with a view toward resolving them.

(d) Threatening to discharge employees or to close the mine if employees selected the Union as their bargaining representative.

(e) Engaging in surveillance of union activities of employees or threatening to place their union activities under surveillance.

(f) Discouraging membership in and activities on behalf of the United Mine Workers of America, AFL–CIO, or any other labor organization, by discharging employees, refusing to recall or rehire them, or otherwise discriminating against them in their hire or tenure.

(g) By any other means, or in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the National Labor relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Louis W. Fauber, Paul D. Bartley, Steve A. Browning, Mickey Hager, Leroy Halstead, Lester M. Lanham, Rodney D. Lanham, Alan H. Nichols, Kenneth Derrick, and Thomas Osborne Jr., full and immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits suffered by them by reason of the discrimination found herein, in the manner described above in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from the personnel records of the abovenamed employees any and all disciplinary warnings and discharge notices, and notify them in writing that such warnings and notices will not form the basis for future disciplinary actions.

(d) Post at the Respondent's Pond Gap, West Virginia place of business copies of the attached notice market ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and msindained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[25] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 9–RC–15876 be, and it hereby is, severed from the consolidated complaint cases, that the election conducted therein be, and it hereby is, set aside, and that said case be remanded to the Regional Director for Region 9 for the holding of a second election at such time as he determines that a fair and free election can be conducted.